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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES H. BRADY,
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Attorney for Petitioner

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Respondent, in its brief in opposition to the allowance of petitioner's petition for a *Writ of Certiorari,* again relies principally upon its contention that "petitioner's application for employment, which he read, *showed on its face* that it was to be approved by the General Manager of the respondent." (Respondent's brief, page 14.) For the convenience of this Court we are incorporating herein a photostatic copy of petitioner's application for employment, reduced in size, which clearly shows the errors of the lower courts in their interpretation and construction of this application. (Exhibit "B," page 15 herein.)

As shown by the opinion of the Circuit Court of Appeals, fully set forth on page 34 of the petition for a *Writ of Certiorari*, Circuit Judge Allen did not concur in the affirmance of the trial court's judgment "on the ground stated" in the opinion, but upon a jurisdictional ground not theretofore urged in the District Court or in the Circuit Court of Appeals. *Judge Allen definitely did not agree with the construction and interpretation placed upon the written application for employment by the lower court.*

The record conclusively shows that the judgments of both lower courts were based exclusively upon their construction of the written application for employment, and not upon their consideration of any other evidence.

The decisions of both lower courts *did not involve any consideration of the oral evidence*, but were based exclusively upon their construction and interpretation of the written application for employment; their construction of the legal effect of the admitted publication by respondent of four consecutive Seniority Rosters, containing petitioner's name, over a period of two years from February 14, 1929; and their construction of the legal effect of Exhibit 8 (R. 30), J. F. Hazel's letter to petitioner of March 7, 1935, assuring petitioner that he had been taken out of service "because of his physical condition," and promising petitioner that if his physical condition could be cleared that he "can and will be returned to service."

A determination by this Court of the important federal questions presented in petitioner's petition for a *Writ of Certiorari* does not involve a consideration of any disputed fact. The four (4) questions presented in the petition for the Writ involve only the correct legal interpretation

and construction to be placed upon written instruments, received in evidence. (Petition for Writ, pages 13, 14.) Respondent, throughout its brief, states that the lower courts considered oral evidence in determining the questions here presented. We submit that the opinion of the District Court (Petition for Writ, pages 32, 33); the findings of fact and conclusions of law of the District Court (R. 14, 15, 16); and the opinion of the Circuit Court of Appeals (page 34, Petition for Writ); show conclusively that the judgments of both lower courts were based exclusively upon their erroneous interpretation and construction of petitioner's written application for employment, and were not based upon any consideration of other evidence. Both lower courts held specifically that the written application *"showed on its face"* that petitioner's employment was only temporary until the approval of the General Manager was endorsed thereon in writing. This interpretation was wholly improper and erroneous.

An examination of the photostat of petitioner's original application for employment, (page 15 herein), demonstrates that both lower courts have placed an erroneous interpretation upon its legal effect. The application in fact *shows on its face* as follows:

1. The fine print, immediately above respondent's signature, ends with the word "approved." The application, above respondent's signature, in no place refers to the claimed requirement of written approval *"by the general manager."* The application does not state that the approval of the application by the General Manager is a condition precedent to petitioner becoming a regular employee.

2. The printing by respondent of certain blank lines, below respondent's signature, for the obvious convenience of the respondent's General Manager, certainly does not constitute a legal requirement of written approval by the General Manager. The blanks below petitioner's signature are not part of the application, and are not referred to in the application itself.

3. By no grammatical construction of the written application can it be said that the printed application *on its face* required the written approval of the General Manager.

4. Unless the words "by the General Manager" are added to and made a part of the fine print, immediately above petitioner's signature, the printed application does not *on its face* require the written approval of the General Manager before the applicant becomes a regular employee. The fine print ends with the word "approved." The approval may be by publication of rosters or by any other customary method. The approval need not be by the General Manager on the face of the application *for the application does not so state.* There is a period after the word "approved" in the fine print.

5. The application, as shown by the photostat, was never "specifically disapproved" by the General Manager. The evidence was uncontradicted that the original application of petitioner was never sent to the General Manager for his approval or disapproval. (R. 179.) How could the general manager approve or disapprove the application if it was never sent to him for action?

6. As a matter of law the application was approved by respondent by the publication by respondent of petitioner's name on four consecutive seniority rosters, im-

mediately after petitioner started to work for respondent, as required by the rules of working agreement (Articles 40 and 52, R. 4).

Unless railroad employees can rely upon published seniority rosters as proof that they have been accepted as regular employees by such railroads, no employee of a common carrier will ever know whether his application for employment has been accepted or not. As in this case after a period of from six to eleven years, depending on when respondent claims petitioner's application was specifically disapproved by the then General Manager of respondent, (from March 1935 to 1940), respondent has asserted that petitioner never became an employee on February 14, 1929, or thereafter, because its new General Manager, either in March 1935 or in 1940, disapproved the written application made on February 14, 1929. This asserted claim is made in face of respondent's admissions in the evidence, (R. 180), and on page 7 of respondent's brief, that sixty (60) days is ample time to check on applicant's qualifications. The evidence shows nothing about sixty (60) days "in the aggregate," being required to check qualifications of petitioner. The evidence adduced by respondent, (R. 180, 181) shows conclusively that from thirty (30) to sixty (60) days is ample time to check such qualifications. Furthermore, respondent admitted without reservation that petitioner would have worked regularly throughout the remainder of the year 1929 had it not been for "slack business," and that "there wasn't any work for him (meaning petitioner) from June to December, 1929." (R. 200.) There was no evidence of any investigation by respondent of petitioner's qualifications after March 20, 1929. In fact, respondent admitted that its investigation of petitioner's qualifications ended on March 20, 1929. (R. 193.)

No further investigation by respondent of petitioner's qualifications was pending when respondent, after petitioner had worked regularly as a fireman for respondent from February 14, 1929 to the end of March, 1929, earning $112.64 in February, 1929, and $86.42 and $9.79 to the end of March, 1929, as testified by E. L. Ray, respondent's general manager at the time of the trial; no further investigation of petitioner's qualifications was pending when respondent furloughed petitioner in March, 1929 (R. 82), and admittedly gave petitioner a written leave of absence in May, 1929, (R. 198, Exhibit 23), in accordance with the rules of the working agreement (Article 48, R. 4); no further investigation by respondent of petitioner's qualifications was pending when respondent admittedly published a seniority list of its regular firemen on or about August 1, 1929, containing petitioner's name with the effective date of his seniority as of February 14, 1929, (R. 181, Exhibit 13); no further investigation of petitioner's qualifications was pending when respondent recalled petitioner to active service as a fireman during the last half of December, 1929, when petitioner admittedly earned $23.72 as shown by the testimony of E. L. Ray, respondent's general manager, (R. 216); no further investigation of petitioner's qualifications was pending when respondent admittedly published seniority lists of its regular firemen on February 1, 1930, August 1, 1930 and February 1, 1931, containing petitioner's name as a regular fireman of respondent with the effective date of his seniority as of February 14, 1929. (Exhibits 14, 15 and 21); no investigation of petitioner's qualifications was pending when petitioner was recalled to active service as a fireman on January 29, 1935 by respondent, (R. 83, 84); and no investigation of

petitioner's qualifications was pending when respondent's superintendent, J. F. Hazel, who hired petitioner as a fireman on February 14, 1929, and who again had charge of hiring firemen for respondent on March 7, 1935, gave petitioner a letter, (Exhibit 8, R. 30), assuring petitioner that he had been taken out of service "because of his physical condition," and further assuring petitioner that he "can and will be returned to service" if his physical condition "can be cleared and he can pass the physical examination required by the company."

The evidence is therefore undisputed that petitioner was out of service from December, 1929 to January 29, 1935, when he was recalled to active duty, entirely because of reduction in force and "slack business," (R. 184, 200), and did not lose his seniority under the rules of the working agreements, (Article 40, 48, and the supplement of March 20, 1928, R. 4, 5). No new application for employment by petitioner was pending either in 1935 or 1940, when respondent asserts the then general manager disapproved petitioner's original written application for employment.

Respondent is seeking to establish as a principle that the railroad, in this case, can arbitrarily take a man out of service without complying with the rules of the written agreement, by merely asserting that since the employee was never employed, because the general manager never approved its original application, that such employee has no seniority rights and is not protected by the rules of the written agreements. Respondent contends that in 1935, and again in 1940, its then general manager, more than six years after the original employment on February 14, 1929, specifically disapproved the original written application,

which admittedly was never even sent to the general manager for approval or disapproval. The mere statement of the incongruous situation that has resulted from the decisions of the lower courts in this case shows the necessity of a review by this Court. State laws do not control or define the rights of interstate railroad employees. The questions here presented are questions involving the basic rights of all railroad employees and are therefore federal questions of great importance.

GROUNDS ON WHICH JURISDICTION IS SOUGHT TO BE INVOKED

On page 3 of its brief respondent contends that "the fact is that this case does not involve any dispute as to any principle," but turns upon the evidence of this case alone. We submit that the decisions of the lower courts in this case do involve "principles" of great public interest, especially to every employee of every common carrier in the United States, whose seniority rights are seriously jeopardized thereby.

It certainly is a principle of great public interest which should be decided by this Court as to whether or not a common carrier can successfully assert, after a period of from six to eleven years, that an employee never became a regular employee because the General Manager of such common carrier never approved in writing the original written application of such employee. If the decisions of the lower courts are permitted to stand then common carriers can with impunity at any time terminate an established employer-employee relationship by merely asserting that some railroad official has not approved in writing the original

application for employment. The assurance of continued employment of all railroad employees in accordance with their seniority is jeopardized by the decisions of the lower courts.

It certainly is a "principle" of great public interest and of vital importance to every railroad employee as to whether or not railroads can disregard the security afforded to all railroad employees by the publication of seniority rosters, published under the written working agreements with their employees, by merely asserting that the general manager, or some other high official of such individual railroad, has not personally approved the publication of such rosters. Surely, railroads must be bound by the publication of such rosters. It should never be necessary in a given case for an employee to be compelled to prove that the officials of such railroad had personally approved such rosters. If the rosters are published in accordance with the provisions of the working agreements then common carriers should be bound thereby. Otherwise seniority rosters would be valueless to railroad employees, as employment could be terminated by carriers at the whim or caprice of railroad officials with irreparable injury to the seniority rights of all affected employees.

It is a matter of the utmost importance to every railroad employee to secure a reversal of the decisions of the lower courts, holding that there can be no waiver or estoppel asserted against a common carrier, by reason of the admitted publications of its seniority rosters, under the written agreements with such employees, unless it can also be shown that the officials of such railroad personally approved the publication of such rosters. In this case the lower courts specifically held that respondent was not

bound by the admitted publications of respondent's seniority rosters of its firemen, unless petitioner showed that respondent's general manager approved such publications. How can a common carrier successfully carry on its diversified business if the general manager, personally, is obligated to personally and specifically approve the correctness of all its seniority rosters, published under the written agreements, in order to bind such carrier by such publications. Respondent offered no evidence that seniority rosters were ever sent to the general manager for approval or disapproval. In this case respondent should be bound by its admitted publication of four consecutive seniority rosters, containing petitioner's name as a regular fireman, with the effective date of his seniority as of February 14, 1929, whether such rosters were ever presented to the general manager for his personal approval or not. The publication of such rosters, under the rules of the written agreements, should bind respondent when published in the customary course of business.

Respondent's Contention That "Petitioner's Employment Was Only Temporary Because His Application for Employment Was Not Approved By the General Manager of the Respondent," Is Clearly Erroneous. (Respondent's Brief, page 6.)

We will not discuss the authorities referred to in respondent's brief as the cases cited, and the rule stated in Volume 1, Section 61, Restatement of the Law of Contracts, (pages 6, 7 of respondent's brief), do not apply to the undisputed factual situation presented in this case. We submit that the federal questions here presented have never heretofore been presented to or decided by any Court of record, either State or Federal.

We fully agree with respondent's contention on page 7 of its brief that railroads should have ample time to check the past records and ability of applicants to perform satisfactory service. It is undisputed in this case that petitioner's services as a fireman were wholly satisfactory (Exhibit 23, R. 198 to 200). No charges or claims of incompetency against petitioner were ever made by respondent or even suggested in the record. On the contrary the evidence is undisputed that petitioner's services were highly satisfactory. (Exhibit 23, R. 200; Exhibit 8, R. 30.)

As definitely established by Exhibit 8, (R. 30), petitioner was temporarily taken out of active service entirely because of a transitory physical disability, consisting of a trace of albumen in petitioner's urine. It was solely because of this temporary physical disability that petitioner was not returned to active service in 1935 when J. P. Main, respondent's general manager, wrote J. F. Hazel a letter, respondent's Exhibit "BB," dated March 15, 1935, advising Mr. Hazel that on account of petitioner's then condition of health he, Mr. Main, could not then approve petitioner's application for "re-employment." It is undisputed that at that time no application for employment, written or otherwise, was pending, as petitioner had merely been recalled to active service by letter from respondent on January 29, 1935, (R. 83, 84); and that after thereupon admittedly working for respondent as a fireman in Lang Yard, Toledo, Ohio, until February 18, 1935, J. F. Hazel, who again had charge of hiring firemen in Lang Yard, and who originally hired petitioner on February 14, 1929, wrote Dr. Burkholder, (Exhibit 18) to examine petitioner "who has *returned* to service as a fireman." This examination was merely a routine checkup. Petitioner had admittedly already passed the required original physical ex-

amination by Dr. Briggs, respondent's medical examiner on February 14, 1929, on his original application. No application for employment was pending in March, 1935. Petitioner had merely been recalled to active service after being out of active duty from December, 1929 until February 29, 1935, entirely by reason of reduction in force and slack business. (R. 82, 198, 200.) Respondent is now seeking to take advantage of its claimed requirement of approval by the general manager, on the face of the original application for employment, to defeat petitioner's just claims. The photostat of the application shows no disapproval by the general manager on the face of the application. In fact the application was never sent to the general manager for any action.

The blank space below petitioner's signature "Recommended for employment as ..... at ....." was never filled in by Mr. Hazel or Mr. Weeks, who had charge of hiring firemen at Lang Yard from 1929 to 1935 at different periods. However, it is undisputed that Mr. Hazel and Mr. Weeks both recommended petitioner for continued employment, as shown by all Exhibits and especially as shown by Exhibit 8, (R. 30), written by Mr. Hazel on March 7, 1935.

Respondent's Claim That "The Requirement of Approval By the General Manager Was Not Waived by the Respondent Under All the Evidence in This Case," Is Not Supported by the Record.

The cases cited by respondent, under this caption, are not in point. We have heretofore fully discussed the lower courts' erroneous interpretation of the original application, which was merely a memorandum form, not even specifically referring to firemen or engineers, and was clearly

used as a matter of convenience by respondent to jot down information as to applicants. The application was in no sense a contract nor was it intended as such. The claimed requirement of approval by the general manager, as a matter of contract, is not borne out by a simple grammatical construction of the application as we have pointed out.

Respondent's claim that Mr. Hazel's letter to petitioner of March 7, 1935, (R. 30), does not bind the respondent by its terms, as found by the trial court, (R. 158, 159), is erroneous. In no sense was Mr. Hazel's letter to petitioner of March 7, 1935 (Exhibit 8), a letter of recommendation. Who ever heard of a letter of recommendation calling attention to the bearer's physical disability, saying nothing about his service being satisfactory, and then assuring petitioner in no uncertain terms that "If this condition can be cleared and he can pass the physical examination required by the company, he can and will be *returned* to service." The letter speaks for itself. Mr. Hazel, who wrote the letter, admittedly hired petitioner on February 14, 1929, and again had charge of hiring firemen for respondent on March 7, 1935, when he wrote Exhibit 8, and gave it to petitioner. Mr. Hazel admittedly not only had charge of hiring firemen for respondent in Lang Yard both in 1929 and again in 1935, but he had the authority of respondent to sign the written agreements of 1925 and 1928, for and on behalf of respondent, binding respondent to the very obligations contained therein which are pertinent and controlling as to the issues here involved, (R. 3, 4, 5). Mr. Hazel's authority to bind respondent to the terms of Exhibit 8, (R. 30), cannot be questioned. Mr. Hazel was dead at the time of the trial. However, Mr. Weeks, the only official of respondent who testified on the subject, testified

on cross-examination that when he performed Mr. Hazel's duties he had the authority of respondent to write such a letter (R. 122, 123). No evidence whatever was offered by respondent to dispute the authority of Mr. Hazel to bind respondent to the terms of Exhibit 8, or to require that the general manager approve Exhibit 8, before respondent could be bound thereby. *At least it cannot be disputed that Exhibit 8 clearly defines petitioner's status with respondent as a regular employee who is temporarily out of service because of his physical condition.*

CONCLUSION

Under the circumstances which we have called to the attention of the Court we submit that the Federal questions here presented involve principles of the utmost importance to all railroad employees; that these questions have not heretofore been presented to or decided by this Court; and that petitioner's petition for a *Writ of Certiorari* should be granted to determine the important Federal questions here presented so that the seniority rights of all railroad employees will not be jeopardized or destroyed.

Respectfully submitted,

CHARLES H. BRADY,
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Toledo, Ohio,
Attorney for Petitioner.

...TROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

Application for Employment.

Conditions

Applicants for employment must be able to read and write, and must be under 40 years of age

A Candidate as Brakeman, Switchman, Policeman, Porter, Laborer, etc., must be generally intelligent, free from all bodily complaints and of a strong constitution. The Candidate must produce testimonials of character from his last employer and also from some person of responsibility and position by whom he is personally known; these with the recommendation will be submitted, on the Candidate appearing for examination, and it will be decided whether he be a proper person to be appointed.

A Candidate as Brakeman, Switchman, or other position in train service, must be 21 and not exceed 40 years of age

A Candidate as Policeman, Porter, Laborer, etc., must be 19 and not exceed 40 years of age

The Company reserves the right to deduct from the pay of any person employed, any fine imposed for neglect of duty or otherwise

Appointments are made on the distinct understanding, that the parties hold themselves in readiness to proceed to duty immediately on being summoned, and that they reside wherever required.

Applicants must fill out the form below in their own handwriting.

State your Christian and Surname in full. John Edward Gibbons

---

State fully your railroad experience- how employed during the last five years—name and address of last employer and reasons for leaving Attach testimonials. Ford R.R. River Rouge plant

Laid off Oct 1926 to Nov 1928. Laid off

Since then, farming.

State date and place of birth Sault Ste Marie, Mich. May 26 - 1902

Have you any physical defects unfitting you for employment on a railroad? Defects. None.

defective sight. None. varicose veins. None. or rupture. None.

State your height 5' 10½ weight. 160 color of eyes. Hazel-B color of hair. Dark Brown

Are you married? Yes. ? If married, what family?

Name of Minister or Priest Mrs Sarah Gibbons.

Address 2041 St John St - Regina Sask.

If put to work, I understand that my employment is only temporary until this application is approved.

Signature John Edward Gibbons

Date 2/14/29 Address

Recommended for employment as

At Lyl & #1

Approved 2/22/29 Date

General Manager

EXHIBIT'S EXHIBIT

FOR IDENTIFICATION

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